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No. .....

Supreme Court of the United States

OCTOBER TERM, 1953

GLENN ACORD; and CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, a corporation,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, the Chicago, Rock Island and Pacific Railroad Company, respectfully prays for a writ of certiorari to be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit rendered on January 14, 1954, reversing a judgment of the United States District Court for the Western District of Oklahoma awarding this plaintiff a judgment against the United States of America.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U.S.C.A., Section 1254(1).

The opinion of the Court of Appeals for the Tenth Circuit was filed January 14, 1954 (R. 15), a petition for rehearing filed February 3, 1954 (R. 31), was denied February 8, 1954 (R. 39).

OPINION BELOW

The District Court did not file an opinion in this case, but its formal findings of fact and conclusions of law and judgment are printed in the record (R. 10).

QUESTIONS PRESENTED

I.

Whether the petitioner railroad's breach of duty to warn one upon its premises that a mail bag might be thrown from one of its trains is negligence of such character as to make the railroad a joint tort feasor and hence not entitled to recover over against the United States whose negligence in dispatching a mail bag from the train onto an unauthorized area was found to be the direct and proximate cause of the injuries for which damages were sought by the person when struck by such mail bag.

II.

Whether the Court of Appeals departed from accepted and usual course of judicial proceedings in reversing the

conclusion of the trial court that as between the petitioner railroad and the respondent, the United States, the petitioner's negligence was passive in character and that the respondent's negligence was active and the direct and proximate cause of the accident without the record evidence upon which the conclusion was based.

STATEMENT OF THE MATTER INVOLVED

One Glenn Acord, brought an action against the petitioner, the Chicago, Rock Island and Pacific Railroad Company, to recover damages for injuries sustained upon the premises and property of the petitioner (R. 1). At the time of the accident Acord was standing upon the station platform of the petitioner at Minco, Oklahoma, engaged in a conversation with petitioner's railroad station agent. The complaint alleged that Acord was injured when struck by some baggage believed to be a mail bag thrown from one of petitioner's passing trains, and that the petitioner railroad failed to give any warning that objects would be thrown from its train. With leave of court, the petitioner made the respondent, the United States, a third party defendant alleging that if Acord was injured, his injuries resulted solely from the acts of the agents and employees of the United States in negligently dispatching baggage or mail bags and that by reason thereof, the petitioner railroad was entitled to be subrogated or indemnified by the respondent, the United States, for any sum Acord might recover from the petitioner railroad (R. 5).

The actions were tried to the trial court without jury and the trial court found petitioner railroad owed a duty to exercise ordinary care for Acord's safety; that the rail-

road knew that a mail bag would be thrown from the train and that it might be dispatched in the area where Acord was standing; that the railroad had a duty to warn Acord of the dispatch and that had it done so, Acord could have protected himself. The court further found that the respondent, United States, failed to make proper arrangements for the dispatch of the mail pouch at a place where it would be safe to do so, and found that the mail clerk threw the mail pouch from the train in an unauthorized area (R. 10).

Based upon these findings, the trial court concluded that the petitioner railroad's failure to warn Acord that a mail pouch was to be dispatched from its train constituted passive negligence and awarded Acord a judgment for $10,000.00 against Rock Island. The trial court further concluded that as between the petitioner railroad and the respondent, the United States, the petitioner's negligence was passive negligence only, while in dispatching the mail pouch in an unauthorized area the respondent was guilty of active negligence which was the direct and proximate cause of the injuries to Acord and that the petitioner railroad was entitled to recover over against the respondent the amount of the judgment awarded Acord against the petitioner (R. 10).

On appeal the Court of Appeals for the Tenth Circuit held a matter of law that both the petitioner railroad and the respondent, the United States, were concurrent and joint tort feasors; that both were primarily liable and under Oklahoma law the petitioner railroad was not entitled to indemnity from the respondent, the United States. The Court of Appeals reversed the judgment in favor of the petitioner and remanded the cause with in-

structions to dismiss the third party complaint against the respondent, the United States, with prejudice (R. 15).

REASONS RELIED ON FOR WRIT OF CERTIORARI

I.

This case decides an important question of local law in conflict with applicable Oklahoma decisions.

Oklahoma follows the general rule that as between joint tort feasors there can be neither contribution nor indemnity, but the Oklahoma Supreme Court recognizes that the rule has its exceptions. The Supreme Court of Oklahoma and the Court of Appeals both recognize that where parties are equally in the wrong or stand in *pari delicto*, that indemnity or recovery over should not be allowed as between them. Both the Supreme Court of Oklahoma and the Court of Appeals recognize that one whose active negligence imposes liability upon another who is guilty of passive or constructive negligence only, the former should in indemnity save the latter harmless. *Cain* v. *Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641.

The decision of the Court of Appeals presents a matter of great public concern in the State of Oklahoma, for the effect of such decision is to completely abolish indemnity actions in the State of Oklahoma. Since an action for indemnity does not arise until the one seeking to be indemnified has been held liable for a wrong which has been caused by the negligence of another, it is fundamental that prerequisite to the establishment of legal liability for a tort, the indemnitee, or the one sought to be indemnified, must have owed a duty to the third person against whom

the tort was committed, a violation of that duty and a finding that such violation contributed to the injuries for which damages are sought.

Under the holding of the Court of Appeals that one who has been found guilty of a breach of duty contributing to injuries for which damages are sought is such a tort feasor as to be barred from recovery in indemnity without distinction as to whether or not his negligence is active or passive, there could never be an action for indemnity, notwithstanding the Oklahoma court's holding to the contrary.

II.

The Court of Appeals departed from the accepted and usual course of judicial proceedings in reversing the lower court.

In its specifications of error on appeal, the respondent, United States, did not attack the findings of the trial court, or the sufficiency of the evidence to support the trial court's conclusion that the Rock Island's negligence was passive in character, and did not designate any of the evidence to be made a part of the record (R. 13). Because the United States was attacking the judgment against it on the venue question, and because it did not question the sufficiency of the evidence to support the trial court's conclusion that the petitioner's negligence was passive only, petitioner likewise did not designate that the evidence should be made a part of the record on appeal. The conclusion of the trial court that the petitioner's breach of duty in failing to warn Acord that a mail bag would be thrown from

its train was an act of omission which was passive in character was reversed by the Court of Appeals without any of the evidence upon which the trial court based such conclusion before it.

In the interest of a correct decision petitioner urged in its petition for rehearing before the Court of Appeals that such evidence should be brought before the court before its decision reversing the judgment against the United States be permitted to become final, which was refused (R. 31).

SPECIFICATIONS OF ERROR

The Court of Appeals erred in reversing the trial court's judgment in the following particulars:

I.

In concluding that the petitioner, the Rock Island railroad, was a concurrent and joint tort feasor and as such was not entitled to recover over against the respondent whose active negligence the trial court said had been the direct and proximate cause of the injuries for which the petitioner had been held liable.

II.

In reversing the judgment of the trial court without all of the record evidence upon which such conclusion was based.

ARGUMENT

(Opinion Below, Jurisdiction and Statement of the Case are set forth in the Petition, supra.)

Petitioner does not challenge the rule prevailing under Oklahoma law which denies contribution as between tort feasors who are in *pari delicto*, but it is this petitioner's contention that under Oklahoma law the rule does not negative the principle of indemnity on other grounds. That is, where the parties are not in *pari delicto* and the injuries result from the acts of one whose active negligence is the primary dominant cause of the injury, and if such negligence exposes another to liability because of passive negligence, the former is liable to the latter in the full amount of the damages incurred by such action.

In its opinion reversing the judgment of the trial court the Court of Appeals points out that the Oklahoma case of *Cain* v. *Quannah Light & Ice Co.*, 131 Okla. 25, 267 Pac. 641, does not fully answer the questions presented in petitioner's third party complaint against the respondent, the United States. The Court of Appeals further stated that it was of the opinion that the Oklahoma Court would follow cases from other jurisdictions and hold that indemnity could be granted only where one person's negligence caused and contributed to the injury for which damages are sought, when the other was guilty of constructive negligence only.

We think the Court did not need to go beyond Oklahoma law to reach the correct decision in this case. The basic principle of subrogation or indemnity is that the burden of discharge of the debt or obligation should be placed

where it ought to rest. Judge Pickett, speaking for the Court of Appeals for the Tenth Circuit in *Bennett* v. *The Preferred Accident Ins. Co. of N.Y.*, 192 F.2d 748, recognized that this principle is well entrenched in Oklahoma law, and cited many Oklahoma cases where the principle had been applied.

In Acord's action the petitioner could not avoid liability by showing that the cause of injuries was the negligence of the United States in dispatching the mail bag in an unauthorized area, for the petitioner had the legal duty to maintain its premises in a reasonably safe condition for those lawfully depending upon them, and this duty could not be delegated to a third party. But, as between the petitioner and the respondent, United States, both of whom are joint tort feasors as to Acord, they were not in *pari delicto*, and the rule against indemnity as between joint tort feasors is not applicable. Annotation of cases applying this rule, 140 A.L.R. 1306.

Petitioner had the right to rely upon respondent's agent to dispatch the mail in the proper area and had the agent done so petitioner would not have been exposed to liability. Because the act of the United States in dispatching the mail in an unauthorized area was the primary and direct cause of the injury for which the petitioner was held liable, the burden of discharging such debt should be placed upon the respondent.

If the questions presented here were presented to the Oklahoma Supreme Court and if that Court felt it necessary to go beyond the boundaries of its own decisions to decide this case, we urge that under its statement of the

exception to the rule as to indemnity between tort feasors set out in *Cain* v. *Quannah Light & Ice Co., supra,* and under the firmly entrenched rule in Oklahoma that the burden of discharging the debt or obligation should be placed where it ought to rest, the Oklahoma Supreme Court would follow the rules laid down in *Kahler* v. *Liberty Mut. Ins. Co.,* 204 F.2d 804, and in the landmark case of *Washington Gaslight Co.* v. *District of Columbia,* 161 U.S. 316, and the hundreds of decisions throughout the country following the rules therein announced.

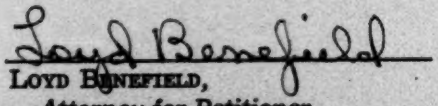
Under the present decision of the Court of Appeals one cannot avail himself of the common-law right of indemnity heretofore recognized in Oklahoma. See *U. S.* v. *C., R. I. & P. Ry. Co.,* 171 F.2d 377 (C. A. 10). For it is fundamental that before such right comes into existence, the one seeking to be indemnified must have been held legally liable for the sum he seeks to recover over against the one who caused such loss, and that to be held liable it is necessary first that the one seeking indemnity should have owed a duty to the person for whose injuries he has been held liable, that there was a violation of that duty, and that such violation contributed to the injury. In effect, the decision of the Court of Appeals is to completely repudiate indemnity actions in Oklahoma and abolish the same.

On the trial of this case the respondent, the United States, protested the jurisdiction of the trial court over it because of the lack of proper venue under the Federal Tort Claims Act, 28 U.S.C.A., 1402(b). The respondent did not contend in the trial court, nor offer any evidence tending to show, that the injuries to Acord were caused by the

negligence of the railroad. On appeal its main question was that of venue. In its designation of the record on appeal it did not question the sufficiency of the evidence to support the trial court's findings that the petitioner's negligence in failing to warn Acord that a mail bag would be thrown from one of its trains was passive only, and the petitioner, being satisfied with its judgment against the respondent did not certify any of the evidence on appeal.

In reversing the trial court's conclusion as to petitioner's passive negligence, the Court of Appeals acted without any of the evidence supporting such conclusion before it.

Respectfully submitted,



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April, 1954.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 676

GLENN ACORD,[1] AND CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for the Western District of Oklahoma (R. 10-13) are not reported. The opinion of the Court of Appeals for the Tenth Circuit (R. 15-28) is reported at 209 F. 2d 709.

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[1] Although Glenn Acord appears in the caption of the case as one of the petitioners for a writ of certiorari, the petition otherwise indicates that it was filed solely on behalf of the Chicago, Rock Island & Pacific Railroad Company.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1954 (R. 28). The petition for rehearing (R. 31-37) was denied on February 8, 1954 (R. 39). The petition for a writ of certiorari was filed on April 7, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the decision of the Court of Appeals for the Tenth Circuit stating the Oklahoma law with regard to indemnity between joint or concurrent tortfeasors is so arbitrary, unreasonable, or clearly wrong as to require review by this Court.

STATUTES INVOLVED

The Federal Tort Claims Act, as codified in 28 U. S. C., provides in part:

> §1346(b). Subject to the provisions of chapter 171 [§§ 2671-2680] of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> § 2674. The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the

same extent as a private individual under like circumstances * * *.

STATEMENT

Glenn Acord, a resident of Chickasha, Oklahoma, brought an action in the District Court for the Western District of Oklahoma against the Chicago, Rock Island & Pacific Railroad Company (hereinafter sometimes referred to as "the Railroad") to recover for injuries sustained while lawfully upon the premises and property of that Company at Minco, Oklahoma. The complaint alleged that Acord was injured when struck by some baggage, believed to be a mail bag dropped from a passing train operated by the Railroad, and that the Railroad had carelessly and negligently failed to give any warning that objects would be thrown from its train, although this practice had been continuous for approximately 20 years (R. 1-2).

The Railroad, with leave of court (R. 4), filed a third-party complaint against the United States alleging that if Acord suffered injuries as stated in his complaint, they resulted solely from the acts of agents and employees of the United States in negligently disposing of the baggage or mail bag, and that the Railroad was, therefore, entitled "to be subrogated or indemnified" by the United States for any sum that Acord might recover in his suit (R. 3-4).

A motion by the United States to dismiss the Railroad's third-party complaint because of improper venue was denied (R. 8), and the United States then entered a general denial, whereupon the actions were tried to the court. The court found

that Acord, while lawfully on the Railroad's premises as a business invitee, was injured when struck by a mail pouch thrown from the train by a mail clerk, an employee of the United States (Fdg. 3, R. 11); that the Railroad owed a duty to Acord to exercise ordinary care for his safety; that the railroad agent knew that a mail pouch would be thrown from the train and that it might be dispatched in the area where Acord was standing; that the Railroad had the duty of warning Acord of the danger, and that had it done so Acord could have protected himself and avoided the accident; and that this breach of duty proximately contributed to the accident and injuries (Fdg. 4, R. 11).

The court further found that the United States had failed to make proper arrangements for the discharge of the mail pouch at a place where it would be safe to do so, and that the mail clerk had negligently thrown the mail pouch from the train in an unauthorized area (Fdg. 5, R. 11).

In its conclusions of law the court held that the failure of the railroad to discharge its duty toward Acord "constituted passive negligence" and that Acord was, therefore entitled to a judgment against the Railroad on account of his injuries in the sum of $10,000 (R. 12). The court also held that the United States was "guilty of active negligence," and that the Railroad was entitled to judgment over against the United States for the full amount awarded Acord (R. 12). The court entered judgments accordingly (R. 12-13).

On appeal by the United States, the findings of fact made by the District Court were not chal-

lenged. The United States urged that the judgment should be reversed because (1) the claim for indemnity was one sounding in quasi-contract rather than in tort, and that the District Court could not consider such a claim under the Federal Tort Claims Act, (2) the venue was improperly laid, and (3) Oklahoma law does not allow indemnity between concurrent tortfeasors in circumstances like those present in this case.[2]

The Court of Appeals for the Tenth Circuit (one judge dissenting), after sustaining the decision of the District Court on the venue question (R. 17-22), reversed the holding of that court on the indemnity issue on the ground that there is no contribution or indemnity between joint tortfeasors under Oklahoma law, and remanded the case with directions to dismiss the third-party complaint with prejudice [3] (R. 28). The rationale of the holding of the Court of Appeals was that the Supreme Court of Oklahoma had already held that there is no contribution between joint tortfeasors in that state and that its holding bore indications that the Oklahoma courts will follow the well-considered decisions which limit the exception to the general no-contri-

[2] Petitioner erroneously implies (Pet. 6, 11) that respondent was concerned on the appeal only, or primarily, with the venue question. Respondent's brief in the Court of Appeals devoted only a little more than a page to the venue question and more than five pages to the Oklahoma law question. See respondent's statement of points on appeal (R. 13-14).

[3] Judge Bratton took the view that the venue had been improperly laid, and that the District Court was for that reason without jurisdiction. Hence, he believed that the third-party complaint should have been dismissed without prejudice, leaving the Railroad to whatever remedy it might have on the indemnity issue in a court of competent jurisdiction.

bution-between-joint-tortfeasors rule to those cases where one joint tortfeasor is guilty of an act or omission which causes injury, but the other is guilty of only constructive fault (R. 22-26).

ARGUMENT

1. The Federal Tort Claims Act, in 28 U. S. C. §§ 1346(b) and 2674, imposes liability on the United States for the torts of its employees only to the same extent and in the same circumstances as the law of the place where the tort occurred imposes liability on a private person. The Court of Appeals, holding that the Act covered the Railroad's claimed right to be indemnified by the United States,[3a] looked to the law of Oklahoma to determine whether a private person who has committed a tort in that state is liable to indemnify a joint or concurrent tortfeasor. It concluded that the courts of Oklahoma would not allow indemnity among tortfeasors except possibly where there was actual fault on the part of one tortfeasor and only imputed or constructive fault on the part of the other. Since in this case there were unchallenged findings of fact showing that both the United States and the Railroad Company were guilty of actual fault, and that neither of them was guilty of simply an imputed or constructive fault, the court held that the third party complaint seeking indemnity must be dismissed.

Petitioner now asks this Court to set aside the Tenth Circuit's holding concerning Oklahoma law

[3a] The Court of Appeals rejected the Government's argument that a suit for indemnity is quasi-contractual in nature and therefore not within the Federal Tort Claims Act.

despite the fact that that Court of Appeals has more frequent occasion to treat with Oklahoma law than any other Federal appellate court, since the State of Oklahoma is included within its circuit. This Court has on numerous occasions stated that it would not, in such circumstances, substitute its judgment for that of the lower court unless the Court of Appeals' decision appears to be arbitrary, unreasonable, or clearly erroneous. *Helvering* v. *Stuart,* 317 U. S. 154, 162-165; *Francis* v. *Southern Pacific Co.,* 333 U. S. 445, 447-448; *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701, 707-708; *Propper* v. *Clark,* 337 U. S. 472, 486-487; *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530, 534; see *MacGregor* v. *State Mutual Co.,* 315 U. S. 280; *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725, 755.

Petitioner has not shown that the Tenth Circuit's statement of Oklahoma law with regard to indemnity between joint tortfeasors is plainly erroneous, arbitrary, or unreasonable. Nor has it indicated on what grounds the Court of Appeals might have reached some other reasonable conclusion with respect to the state of that law. Instead, petitioner makes the bare assertion that "In effect, the decision of the Court of Appeals is to completely repudiate indemnity actions in Oklahoma and abolish the same" (Pet. 10). Thus, petitioner's statement seems to be no more than a mere suggestion that the Oklahoma law leaves something to be desired. Since the function of the Court of Appeals was to interpret Oklahoma law, not to modify it, petitioner's suggestion, even if warranted by the decision of

the court below, does not make it manifest that the Court of Appeals erred in its interpretation.[4] Obviously, a mere intimation that the state law might well be more desirable, is not a sufficient basis for holding that a federal decision interpreting that law is clearly erroneous.

2. In any event, the Court of Appeals could not reasonably have reached a conclusion concerning the Oklahoma law question different from the one it reached, and, having arrived at that conclusion, it had no alternative, in view of the accepted facts of this case, but to direct the dismissal of the third party complaint.

a. The petition cites only one decision by the Oklahoma courts, *Cain* v. *Quannah Light & Ice Co.*, 131 Okl. 25, 267 Pac. 641, concerning the question of indemnity between tortfeasors,[5] and that case clearly supports the conclusion that Oklahoma does not allow such indemnity where both tortfeasors were guilty of actual fault.

In that case the Hartford Indemnity Co. had partially discharged a tort liability of the United

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[4] Petitioner's conclusion is, of course, greatly exaggerated. Oklahoma law, as understood by the Court of Appeals, would deny indemnity where, as here, both tortfeasors were actually at fault. The Court of Appeals decision goes no further than to decide that point. What the Oklahoma courts might do if faced with different facts was not necessary for the decision here, but the court below did point to the possibility that indemnity would be permitted if one tortfeasor was guilty only of constructive fault (R. 23).

[5] None of the other cases cited by petitioner is concerned with the state law question here involved. That some of them may hold that the burden of discharging an obligation "should be placed where it ought to rest" (Pet. 10) does not assist the Court—the problem here is to find just where Oklahoma law would hold that the burden ought to rest.

States Gypsum Co. Being subrogated to the rights of Gypsum, Hartford thereafter commenced an action for indemnity against the Quannah Ice Co. which, it was alleged, was jointly liable along with Gypsum for the damages. The Oklahoma District Court directed a verdict for Quannah on the theory that Quannah and Gypsum were joint tortfeasors between whom there could be neither contribution nor indemnity.

On appeal it was contended that the rule precluding contribution and indemnity between joint tortfeasors, relied upon by the Oklahoma District Court, only applied where the parties were equally in the wrong and could not be applied against Gypsum which, it was alleged, was only constructively liable. Conceding the correctness of the rule as stated, the Supreme Court of Oklahoma held that it did not apply to the facts involved. After relating the nature of the negligence complained of, the court said (131 Okl. at 29, 267 Pac. at 644):

> In these circumstances, it occurs to us that it cannot be seriously contended that the Gypsum Company was free from wrong, and that the fault and wrong was wholly the fault and wrong of the defendant [Quannah].

With respect to the right of indemnity or contribution in such circumstances, the Supreme Court of Oklahoma in the *Cain* case quoted with approval from 6 R.C.L. 1056, as follows (131 Okl. at 29, 267 Pac. at 644):

> There is some authority for the statement that the rule that the right of contribution does

> not exist as between joint tortfeasors has no application to torts which are the result of mere negligence, but the prevailing view seems to be that where the concurring active negligence of two persons causes injury to a third, and one of the wrongdoers is compelled to discharge the liability thereby incurred, no contribution or indemnity can be had. [131 Okl. at 29, 267 Pac. at 644.]

The court below, in considering the *Cain* case, concluded that (R. 23):

> While that decision does not fully answer the question presented in the instant case, we think it points the way and indicates that the Oklahoma courts will follow well considered decisions which hold that the exception to the general rule is limited to those cases where one person is guilty of the act or omission which causes the injuries, but another who is guilty only of constructive fault, because of his legal relationship to the person guilty of the act or omission or his positive legal duty to the person injured, is also liable to the latter for the damages suffered.

Consequently, there is in the decision of the Supreme Court of Oklahoma in the *Cain* case much direct support and considerable implied support for the holding of the court below as to the Oklahoma law.

b. Having correctly determined that Oklahoma would not permit a tortfeasor to be indemnified by a joint tortfeasor where both were actually at fault,

the Court of Appeals quite properly directed the dismissal of the third party complaint. The unchallenged findings of fact (R. 11) show that both the United States and the Railroad were guilty of actual negligence. The Railroad was not held liable to the plaintiff below because of its status as a common carrier or because of some special relationship to the plaintiff;[6] its liability stemmed solely from its failure to exercise ordinary care (Fdg. 4, R. 11). Under Oklahoma law, then, it was clearly not entitled to indemnity, for whatever else may be said of the *Cain* decision, it clearly stands for the proposition that there is no indemnity where there is actual fault by both parties.

This result cannot be avoided by characterizing the negligence of one party as "active" and that of the other party as "passive", as the District Court attempted to do (R. 12). The term "passive", as used by the District Court in its conclusions of law, plainly applied to the omission by the Railroad to give adequate warning of the danger. It was not, therefore, a mere constructive negligence, but was actual negligence, and was sufficient to bar recovery of indemnity by the Railroad under its third-party complaint.

It is possible, of course, that the negligence of the United States was greater in degree than that of the Railroad, and that each label employed by

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[6] Cf. *United States* v. *Chicago R. I. & P. Ry. Co.*, 171 F. 2d 377 (C.A. 10, 1948), cited by petitioner (Pet. 10). In any event, the court there made it clear that it was not applying Oklahoma law (171 F. 2d at 379).

the District Court as to the degree of negligence was hung about the neck of the proper party. But the fact remains that such differences in the degree of negligence are, under the *Cain* decision, immaterial so long as both parties were actually at fault. In any event, application of such degrees of negligence would require acceptance of the doctrine of comparative negligence, and the Oklahoma courts have clearly refused to accept that doctrine. See *Hailey-Ola Coal Co.* v. *Morgan*, 39 Okl. 71, 134 Pac. 29; *Von Keller* v. *Ream*, 93 Okl. 179, 220 Pac. 330; *Gourley* v. *Oklahoma City*, 104 Okl. 210, 230 Pac. 923; *Mount* v. *Nichols*, 198 Okl. 282, 177 P. 2d 1013.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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